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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HUSSMANN CORPORATION,
Petitioner,

vs.

ROSETTA COOK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Is a union employee's state-law claim for workers' compensation retaliatory discharge "independent" of the governing collective bargaining agreement and therefore not preempted by §301 of the Labor-Management Relations Act even though the employer's defense is that the employee was discharged for violating specific provisions in the labor agreement?

2. Do state-law claims for retaliatory discharge constitute a special "exception to the reach of federal preemption" as held by the Supreme Court of Missouri below?

3. If a right granted to a union employee by state law is not preempted, can the right nonetheless be waived by provisions in the collective bargaining agreement?

LIST OF PARTIES

Petitioner before this Court is Hussmann Corporation (hereinafter "Hussmann"), a Missouri corporation. Hussmann is a wholly owned subsidiary of Whitman Corp., a Delaware corporation. Respondent Rosetta Cook is an individual.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities Cited	v
Opinions Below	1
Jurisdiction	1
The Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
The Missouri Supreme Court Below Decided Important Federal Questions Concerning Preemption Under §301 of the Labor-Management Relations Act Which Have Not Been, But Should Be, Settled By This Court; The Court Below Also Decided Important Federal Questions In Conflict With Decisions of This Court, the Federal Courts of Appeals and Another State Court of Last Resort	8
A. The Questions Presented Are Important Both Because Of the Proliferation of Retaliation and Other State-Law Claims Asserted By Union Employees In the State and Federal Courts and Because Of the Need To Assure That the Preeminence Of the Collective Bargaining Scheme Of the Federal Labor Laws Is Maintained and Not Eroded	8

B. Subsequent To This Court's Seminal Decisions In *Lueck* (1985) and *Lingle* (1988) the Law Regarding §301 Preemption Has Become Increasingly Unsettled; A Further Decision By This Court Is Needed 11

C. The Case At Bar Presents Three Of the Most Recurrent Issues Regarding §301 Preemption and Is A Uniquely Appropriate Vehicle For This Court To Settle and To Resolve Conflicts and Give Guidance In This Troubled Area of Law 14

Conclusion 23

APPENDIX

Opinion of the Supreme Court of Missouri A-1

Opinion of the Missouri Court of Appeals, Eastern District A-7

Judgment of the Circuit Court of St. Louis County, Missouri A-16

TABLE OF AUTHORITIES CITED

Page(s)

Cases:

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 6,10-13,16,17,19,21

Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir. 1989) 17,18

Catepillar Inc. v. Williams, 482 U.S. 386 (1987)..... 16,17

Clark v. Newport News Shipbuilding and Dry Dock Co., 937 F.2d 934 (4th Cir. 1991) 20,22

Commodore v. University Mechanical Contractors, Inc., 839 P.2d 314 (Wash. 1992) 14

Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989) 20

Eldridge v. Felec Services, Inc., 920 F.2d 1434 (9th Cir. 1990) 18

Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991)..... 13-14

Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988) 17

Harris v. Alumax Mill Products, Inc., 897 F.2d 400 (9th Cir.), cert. denied, 498 U.S. 835 (1990) 20

Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), cert. denied, 490 U.S. 1107 (1989) 20

Jarvis v. Nobel/Sysco Food Services Co., 985 F.2d 1419 (10th Cir. 1993) 17,18,22

Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 14,20

Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990) 20

Jones v. Roadway Express, Inc., 931 F.2d 1086 (5th Cir.), reh'g denied, 936 F.2d 789 (1991) 15,18

Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473 (6th Cir. 1990) 15,18

Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988)..... 20,22

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) 6,7,9,12-18,21,22

Marshall v. TRW, Inc., 900 F.2d 1517 (10th Cir. 1990)..... 17-19

McCormick v. AT&T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 912 (1992) 19,20,22

Medrano v. Excel Corp., 985 F.2d 230 (5th Cir. 1993)..... 22

Mock v. T.G.& Y. Stores Co., 971 F.2d 522 (10th Cir. 1992)..... 14,22

Nash v. AT&T Nassau Metals, 381 S.E.2d 206 (S.C. 1989).....15,16,20

Nelson v. Central Illinois Light Co., 878 F.2d 198 (7th Cir. 1989) 15-17

Newberry v. Pacific Racing Assoc., 854 F.2d 1142 (9th Cir. 1988) 20

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 9-10,12

Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir.), cert. denied, 493 U.S. 992 (1989) 11,15,18

Sweeney v. Westvaco Co., 926 F.2d 29 (1st Cir.), cert. denied, __ U.S. __, 112 S.Ct. 274 (1991) 18

Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 10,11

Wolfe v. Central Mine Equipment Co., 850 F.2d 469 (8th Cir. 1988) 15

Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) 22

Constitutional Provisions and Statutes:

Article VI, United States Constitution 2

28 U.S.C. § 1257(a) 1

29 U.S.C. § 185(a), § 301 of the Labor-Management Relations Act 2,5,6,10,11,13,14,16,19-21

Section 287.780 R.S.Mo. (1986) 2,5,6

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Note, *Steering Away From the Arbutration Process: Recognizing State Law Tort Actions for Unionized Employees*, 24 U.Richmond L.Rev. 233 (1990) ... 8

Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U.Chi.L.Rev. 575 (1992) 8,9,11

White, *Section 301's Preemption of State Law Claims: A Model For Analysis*, 41 Ala.L.Rev. 377 (1990) 9-11,13,14,16,17,19

Zablotsky, *The Continuing Availability of Retaliatory Discharge and Other State Tort Causes of Action to Employees Covered by Collective Bargaining Agreements*, 56 Albany L.Rev. 371 (1992)..... 15

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HUSSMANN CORPORATION,
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ROSETTA COOK,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner Hussmann Corporation respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered April 20, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 852 S.W.2d 342 and is reprinted in the Appendix (A-1). The opinion of the Missouri Court of Appeals is unreported and is reprinted in the Appendix (A-7). The judgment of the Circuit Court of St. Louis County, Missouri is unreported and is reprinted in the Appendix (A-16).

JURISDICTION

The Supreme Court of Missouri entered its judgment on April 20, 1993. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Article VI, provides in pertinent part:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Section 301(a) of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Missouri's Workers' Compensation Law, Chapter 287 of the Revised Statutes of Missouri, provides in section 287.780:

> **Discrimination because of exercising compensation rights prohibited — civil action for damages.** — No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

§287.780 R.S.Mo.(1986).

STATEMENT OF THE CASE

The Facts

Respondent Rosetta Cook was a union worker at petitioner Hussmann's manufacturing facility in St. Louis County, Missouri (L.F.[1] 35 & 70). When Cook was hired by Hussmann in 1987, she stated in her employment application that she had no back injuries or other serious pre-employment injuries (L.F. 36). Article 9 §4 ¶I of the governing collective bargaining agreement ("CBA") between Hussmann and the Steelworkers labor union (of which Cook was a member) specifically calls for termination of an employee who has falsified his or her employment application (L.F. 35 & 46-47).[2]

Several years later Cook twisted her ankle while working on the assembly line at Hussmann (L.F. 22). She filed a workers' compensation claim against Hussmann under Missouri's Workers' Compensation law, R.S.Mo. Ch. 287 (L.F. 22 & 70). Hussmann filed an answer to the claim admitting the ankle injury (L.F. 18 & 27).

At the same time she filed the claim against Hussmann, Cook also filed a workers' compensation claim against the State of Missouri's Second Injury Fund (L.F. 22; S.L.F. 1). The Second Injury Fund claim sought enhanced recovery (from the State) on the ground that Cook was also suffering lingering effects ("permanent partial disability") from various injuries she sustained prior to her employment with Hussmann (S.L.F. 1). The Second Injury Fund claim was asserted on a preprinted form on the backside of her claim against Hussmann (S.L.F. 1).

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[1] "L.F." refers to the Legal File below. "S.L.F." refers to the Supplemental Legal File.

[2] Article 9 §4 ¶I of the CBA provides that "the employee/employer relationship shall terminate if . . . [t]he employee falsifies or omits relevant information on his application for employment" (L.F. 46-47).

The pre-employment injuries described in Cook's Second Injury Fund claim were the same types of injuries Cook specifically denied having on her original application for employment (L.F. 35-36; S.L.F. 1). Eldon Williams of Hussmann's industrial relations department noticed the discrepancy and suspected a violation of Article 9 §4 ¶I of the CBA (L.F. 11, 14 & 19). He called Cook to his office to inquire about the apparently false statements in her original employment application (*id.*).[3]

Cook refused to answer Williams' questions. She stated it was "unethical" for him to inquire of her because she had a lawyer and that she would not discuss anything without a union representative present, and walked out of his office (per Cook's affidavit, L.F. 11). At the conclusion of a second meeting later that day in Williams' office, when she again refused to answer any questions, Cook was suspended pursuant to Article 8 §4 (L.F. 12-13; *see* preceding footnote).

A few days later, Williams explained to Cook's lawyer over the phone that "we want to talk to her about her original application" (per counsel's affidavit, L.F. 19). The next day Williams and another company official met with Cook and her union representative (L.F. 14).[4] Cook admits she was asked questions "regarding my original application for employment" (Cook's affidavit, L.F. 14). She further admits that "I told [Hussmann] I was not discussing the original application" (*id*). As before, Cook refused to answer any questions and walked out of the room (Cook's affidavit, L.F. 12 & 14).

On September 5, 1991 Hussmann notified Cook she was terminated (L.F. 15). Hussmann's stated reasons for terminating her were violations of Article 9 §4 ¶I of the CBA (falsification

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[3] Under Article 8 §4 Hussmann may investigate suspected violations of the CBA and suspend the employee "pending investigation" (L.F. 45).

[4] Article 6 §2 of the CBA provides that a union representative will be present in the meeting following an employee's suspension (L.F. 42).

or omission of relevant information on employment application), Plant Rule 1 (falsification of application or other company records),[5] and Plant Rule 20 (insubordination) (L.F. 35-36).

Cook did not file a grievance and did not invoke or exhaust the contractual grievance procedure (L.F. 36). The CBA contains a four-step grievance procedure, where the last step is "final and binding" arbitration (Article 7, L.F. 43-45). Under the CBA, a discharged employee may file a grievance claiming that his discharge was "unjust" or involved "unjustifiable Company action" (Article 8 §§4 & 5, L.F. 45-46). As noted, however, Cook never filed a grievance.

Procedural History

Instead of grieving under the CBA, Cook filed a lawsuit in the Circuit Court of St. Louis County, Missouri. Her one-count petition alleged she was discriminatorily discharged by Hussmann in violation of R.S.Mo. §287.780 (1986) for exercising her rights under Missouri's Workers' Compensation law (L.F. 70-73). The petition alleged she was discharged "particularly because she would not submit to private demeaning interrogation by Eldon Williams and others" (L.F. 72).

Hussmann filed a motion for summary judgment (L.F. 30-33). The motion contended that Cook's state-law claim was pre-empted by §301 of the Labor-Management Relations Act, 29 U.S.C. §185(a), and was barred by her failure to invoke or exhaust the grievance procedure under the CBA (*id*). Cook submitted an opposing affidavit stating *inter alia* that "I was terminated solely and only because I refused to be interrogated by Hussmann personnel" (L.F. 10).

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[5] Article 4 ¶J of the CBA states that Hussmann has the right "to create reasonable plant rules and compel their observance" (L.F. 41; *see also* Article 8 §1 [L.F. 45]).

The Circuit Court of St. Louis County sustained Hussmann's motion and entered judgment in favor of Hussmann (A-16). The judge found it to be "undisputed that plaintiff did not file a grievance in accordance with the collective bargaining agreement in existence at the time of the occurrence mentioned in the petition and the Court therefore concludes that defendant is entitled to judgment in its favor as a matter of law" (*id.*). On Cook's appeal, the Missouri Court of Appeals, Eastern District, reversed (A-7). The Supreme Court of Missouri, on Hussmann's petition, accepted transfer (review) of the case and thereby vacated the decision of the Court of Appeals (A-3).

On April 20, 1993, the Supreme Court of Missouri en banc, in a unanimous decision, reversed the summary judgment which had been entered in favor of Hussmann and remanded the case for trial (A-1). The opinion states at the outset:

> Section 287.780, R.S.Mo. 1986, protects employees from retaliatory discharge or discrimination brought about by the employees' exercise of rights granted by the Workers' Compensation Act, Chapter 287, R.S.Mo. We hold that neither federal nor Missouri law requires an employee to invoke or exhaust the grievance procedure in a collective bargaining agreement before filing suit under the statute.

A-1.

The opinion then proceeds to hold specifically that Cook's claim is not preempted by §301 of the Labor-Management Relations Act (A-5). The court acknowledged that under this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), §301 preempts any state-law claim whose resolution requires interpretation of provisions in a collective bargaining agreement (A-3 to 4). The Missouri court characterized this Court's later decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) — which held under rather unique

circumstances[6] that a union employee's workers' compensation retaliatory discharge claim was not preempted — as creating an "exception to the reach of federal preemption in workers' compensation cases" (A-4). Disregarding the specific CBA provisions Hussmann raised by way of defense as the basis for its actions, the court held that retaliation claims are by nature "independent" of the labor agreement and are therefore not preempted. In this regard, the court held, lifting language from *Lingle*, that whenever the "motivation of the employer" is an element of the state-law claim, the "motive" issue can always be "resolved without interpreting the agreement itself" (A-4, quoting from *Lingle*, 486 U.S. at 407 & 409-410). The Missouri high court further specifically held — reaching an issue expressly left open by this Court in *Lingle*, 486 U.S. at 409 n. 9 — that the provisions in Hussmann's CBA "cannot be deemed to be a *waiver*" of Cook's statutory right to bring this action (A-6, emphasis added).

Hussmann did not seek rehearing below and timely filed this Petition For a Writ of Certiorari.

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[6]*See* discussion below at pp. 12 - 13 .

REASONS FOR GRANTING THE WRIT

The Missouri Supreme Court Below Decided Important Federal Questions Concerning Preemption Under §301 of the Labor-Management Relations Act Which Have Not Been, But Should Be, Settled By This Court; The Court Below Also Decided Important Federal Questions In Conflict With Decisions of This Court, the Federal Courts of Appeals and Another State Court of Last Resort

A. The Questions Presented Are Important Both Because Of the Proliferation of Retaliation and Other State-Law Claims Asserted By Union Employees In the State and Federal Courts and Because Of the Need To Assure That the Preeminence Of the Collective Bargaining Scheme Of the Federal Labor Laws Is Maintained and Not Eroded

Twenty-two states now recognize a cause of action for workers' compensation retaliatory discharge.[7] Such claims are but one species of the broader class of claims for "wrongful discharge" or "unjust dismissal" which are now recognized by most states.[8] Employee lawsuits challenging their terminations are in

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[7] Compiled from *Individual Employment Rights Manual*, 9A Lab.Rel.Rptr.(BNA) 102 (index) & 540-92 (1991).

[8] Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U.Chi.L.Rev. 575, 591 (1992). Employee discharge claims come in many varieties, including wrongful discharge, retaliatory discharge, invasion of privacy (used in drug testing cases), intentional infliction of emotional distress, breach of contract, breach of implied covenant of good faith and fair dealing, tortious interference with contract, slander, fraud and defamation. *See* Note, *Steering Away From the Arbitration Process: Recognizing State Law Tort Actions for Unionized Employees*, 24 U. Richmond L.Rev. 233, 242-3 (1990). Additionally, all states now recognize employment discrimination claims based on one or more of the following: race, sex, religion, national origin, age and disability. *See Fair Employment Practices Manual*, 8A Lab.Rel.Rptr.(BNA) 451:102-105 (1992).

derogation of the traditional common law "employment at will" doctrine and were relatively rare prior to the last decade. *See* Stone, *supra* note 8, at 591. In more recent years, however, the "at will" doctrine has been significantly eroded. The decades of the '80s and '90s have seen a virtual explosion in the number of wrongful discharge lawsuits. *See* White, *Section 301's Preemption of State Law Claims: A Model For Analysis*, 41 Ala.L.Rev. 377, 390 n. 57 (1990) ("wrongful discharge litigation [has been] *increasing geometrically*"); Stone, *supra*, at 591 (a "*nationwide trend*").

To the extent such lawsuits are brought by union members who have bypassed available contractual grievance/arbitration procedures,[9] and the suits are permitted to proceed, vital policies and interests of the collective bargaining scheme under federal labor law are jeopardized. "As a general rule," this Court has stressed, employees "must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis in original). The Court continued:

> . . . [U]nless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. *Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant.* LMRA §203(d), 29 U.S.C. §173(d); §201(c), 29 U.S.C. §171(c) (1958 ed.). Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance

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[9] "Nearly all" CBAs contain arbitration provisions. *Lingle*, 486 U.S. at 411 n. 11.

> the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> *A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.* In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters etc. v. Lucas-Flour Co.*, [82 S.Ct. 571, 577 (1962)].

Maddox, 379 U.S. at 652-3 (emphasis added); *accord Lueck*, 471 U.S. at 219-20. Contractual grievance/arbitration procedures play "the central role . . . in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219, *quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). "[A] broad preemption doctrine" which prohibits circumvention of contractual remedies "best serves federal labor interests." White, *supra*, at 393.

The trend of the last decade runs directly contrary to these federal labor interests. Increasing numbers of state-law discharge claims brought by union employees have been allowed to proceed in the courts (state and federal) over §301 preemption objections, thereby posing "significant threats to the vitality of

federal labor principles embodied in collective bargaining." White, *supra*, at 434; *see also Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1339 (6th Cir.), *cert. denied*, 493 U.S. 992 (1989) (Kennedy, J., concurring in part & dissenting in part) ("The danger is clear."). In the view of one commentator, the federal labor scheme premised on "collective rights" is "collapsing" and is being replaced wholesale by a "regime" of state-law-created "individual rights." Stone, *supra*, at 575-6 & 593.

Given the "central role" played by grievance/arbitration procedures in the federal labor scheme, *Lueck*, 471 U.S. at 219, coupled with the recent increasing pressures on the state and lower federal courts to allow individual union employees to proceed with lawsuits against their employers, a special need exists, now more than ever, for an effective and clearly defined doctrine of §301 preemption.

B. Subsequent To This Court's Seminal Decisions In *Lueck* (1985) and *Lingle* (1988) the Law Regarding §301 Preemption Has Become Increasingly Unsettled; A Further Decision By This Court Is Needed

The Court in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) construed §301 of the Labor-Management Relations Act to preempt any state-court suit alleging breach of a collective bargaining agreement. In 1985 the Court recognized a broader reach of the preemption doctrine, holding that a union employee's state-law tort claim, even though not predicated on a breach of the CBA, is preempted by §301 (and therefore subject to dismissal) whenever "resolution of [the] state-law claim is substantially dependent upon analysis of the terms of [the CBA]." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220-21 (1985).[10] The preemption doctrine must reach that far, the Court concluded, in

[10] The Court held that Lueck's suit against his employer for bad faith handling of insurance benefits met the test and was therefore preempted. *Id.* at 221.

order to assure "interpretive uniformity and predictability" for labor agreements, to preserve the "central role of arbitration," and to foster the other federal labor interests listed in the above-quoted excerpt from *Maddox*. *Id.* at 210-20. The Court also stated that, given the inquiry required, preemption must be determined "on a case-by-case basis." *Id.* at 220.

Three years later, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Court addressed the further question whether a state-law claim (as here, for workers' compensation retaliatory discharge) should be preempted whenever the state court would need to engage in "*the same analysis of the facts*" as would a labor arbitrator deciding an unjust-discharge grievance under the CBA. *Id.* at 408 (emphasis in original). The Court refused to recognize such factual "parallelism" as an additional ground for §301 preemption. *Id.* Instead, the Court reaffirmed the test of *Lueck*, namely, that preemption occurs when resolution of the state-law claim requires "interpretation of" or is "substantially dependent on analysis of" provisions in a collective bargaining agreement. *Id.* at 410-13.

The *Lueck* test was not and could not be satisfied in the rather unique procedural context of *Lingle*. Lingle, unlike the typical union-employee plaintiff (who, like Cook, sues without ever invoking the contractual grievance/arbitration procedure), had diligently exhausted the CBA grievance procedure and obtained an arbitrator's award in her favor. *Id.* at 401-2. That award — which found that Norge lacked "proper" and "just" cause to terminate Lingle (*id.*) — was final and binding upon Norge. Norge, unlike Hussmann and the typical employer-defendant, was thus legally foreclosed in the subsequent lawsuit from raising any issues or defenses predicated on provisions in the CBA.

The prior arbitration award thus necessarily took the CBA out of play in Lingle's case. It was in this very unique context, then,

that the Court observed that Lingle's state-court action presented a "purely factual inquiry" — centered on the "motivation of the employer" — that "does not turn on the meaning of any provision of a collective-bargaining agreement." *Id.* at 407. Lingle's state-law claim was "independent" of the CBA "in the sense . . . that matters for §301 preemption purposes" and was thus not pre-empted. *Id.*

The procedural uniqueness of *Lingle*, which is crucial but subtle, has been completely overlooked by the state and lower federal courts.[11] They consequently have been confused by and have misinterpreted the opinion, usually to the detriment of the policies embodied in §301. Many courts (like the one below)[12] have conclusorily applied the result of *Lingle* (*i.e.*, non-preemption), parroting the Court's references to "purely factual inquiry," "motivation of the employer" and "independent," without realizing that in the typical case employer CBA defenses are *not* foreclosed by a prior arbitration award and that, unlike Norge in *Lingle*, such employers are fully entitled to invoke specific CBA provisions in support of their actions — the interpretation and application of which provisions should trigger preemption.[13] *Lingle*'s subtle uniqueness has thus inadvertently misled the lower courts and has made even muddier the waters of §301 preemption.

Notwithstanding *Lingle*'s clarion reaffirmation of the *Lueck* preemption test, *see Lingle*, 486 U.S. at 411 & 413, judicial confusion and conflict have significantly *increased* in the five years after *Lingle*. *See Galvez v. Kuhn*, 933 F.2d 773, 774 & 776 (9th Cir. 1991) (§301 preemption after *Lingle* is "one of the most

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[11] *See* White, *supra*, at 413 (*Lingle* was decided on its "particular facts, a point that seemingly has gone unnoticed by the lower courts").

[12] *See* discussion and cases cited in point C, *infra*.

[13] *See* White, *supra*, at 415 ("all too often" lower courts reject preemption "without regard to contract interpretation issues").

confused areas of federal court litigation," a "thicket," "tangled and confusing"); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1021 (10th Cir. 1990) ("circuits have reached varying [and] conflicting results" after *Lingle*); *Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 530 n.8 (10th Cir. 1992)(same); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 318 (Wash. 1992) ("*Lingle* . . . gives little guidance"; "courts are still struggling"; "§301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*"); White, *supra*, at 378, 385, 392 & 415 (*Lingle* has "increased the uncertainty in the lower courts"; courts are "sharply split"; §301 is "a rapidly increasing source of litigation in the state and federal courts"; *Lingle* has caused "conflicting results among and even within circuits and between the state and federal courts").

A further decision from this Court is needed to guide the lower courts and to put them back on track with respect to the all-important heavily-litigated issue of §301 preemption.

C. The Case At Bar Presents Three Of the Most Recurrent Issues Regarding §301 Preemption and Is A Uniquely Appropriate Vehicle For This Court To Settle and To Resolve Conflicts and Give Guidance In This Troubled Area of Law

The case at bar is an especially well-suited candidate for review. It presents three of the more vexing questions of §301 preemption, the answers to which will go a long way in clarifying this entire area of law. It also involves a state-court plaintiff who (unlike Lingle) completely bypassed the contractual grievance/arbitration procedure, thus presenting the most recurrent §301 scenario and the one most directly affecting the important federal labor policies embodied in §301 (*see* point A, *supra*). Finally, the state-law claim asserted here — workers' compensation retaliatory discharge — is identical to the one in *Lingle*. A finding of preemption by this Court in another workers' compensation retaliation case would be the most effective way to head

off the strong trend of the lower courts, typified by the decision below, to apply uncritically *Lingle*'s *result* (non-preemption) without ever coming to grips with the preemption test *Lingle* reaffirms.[14]

The Missouri Supreme Court below asserted that this Court in *Lingle* "recognized a limited exception to the reach of federal preemption in workers' compensation cases" (A-4). This notion that workers' compensation retaliation cases are *per se* "independent" of labor agreements and therefore not subject to preemption has gained nearly unanimous acceptance after *Lingle*.[15]

[14] In short, a finding of preemption in this case would mean that the *Lingle* decision could no longer be used by the lower courts as an expedient excuse to reject meritorious preemption objections.

[15] *Accord Nelson v. Central Illinois Light Co.*, 878 F.2d 198, 200, 202 (7th Cir. 1989) ("*Lingle* requires that [workers' compensation retaliation claims are] not subject to preemption"; such claims have a "state-law character" which "the defendant may not destroy" by injecting CBA issues); *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1482 (6th Cir. 1990) ("state law prohibiting retaliatory discharges creates rights independent of those created by a CBA"); *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 (5th Cir.) *reh'g denied*, 936 F.2d 789 (1991) ("the right to be free from retaliatory discharge for pursuing workers' compensation exists ... independently of the CBA"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1331 (6th Cir. 1989) ("the state-law tort of retaliatory discharge creates rights independent of those established by the CBA and hence is not preempted"); *see also Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988) (where the court found no preemption simply because "*Lingle* applies with equal force to Missouri's workers' compensation *statute*" without inquiring into whether CBA provisions were implicated in the case); Zablotsky, *The Continuing Availability of Retaliatory Discharge and Other State Tort Causes of Action to Employees Covered by Collective Bargaining Agreements*, 56 Albany L.Rev. 371, 393-4 & 396-7 (1992) ("The Supreme Court has *unequivocally held* that *such claims* are not preempted"; the "*independent nature* of the cause of action" precludes preemption); *see also* additional cases cited in note 18 below.

The one case to the contrary is *Nash v. AT&T Nassau Metals*, 381 S.E.2d 206, 208 (S.C. 1989) ("There is no general rule which establishes that the tort ... will always be immune from preemption").

But *Lingle* does not carve out any such "exception" for workers' compensation cases. *See Nash*, note 15, *supra*. Nor does it suggest, contrary to the prevalent view of the lower courts, *see Nelson*, note 15, *supra*, that certain types of state-law rights are by their very nature "independent" of labor agreements and "not subject to preemption."[16]

Rather, *Lingle* emphasizes that the test of "'independent' that matters for §301 pre-emption purposes" is whether "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407. That determination, the Court previously made clear in *Lueck*, can only be made on a "case-by-case basis." *Lueck*, 471 U.S. at 220. The issue is not the inherent nature of the state-created cause of action, but whether the right "*as applied*" in a particular lawsuit would require interpretation of a labor agreement. *Lueck*, 471 U.S. at 209 (emphasis added).

This Court should grant review to correct the widespread impression in the lower courts, which conflicts with *Lueck* and *Lingle* and the Supreme Court of South Carolina's decision in *Nash*, note 15, *supra*, that workers' compensation retaliation cases constitute a special "exception" to the reach of federal preemption.

A further distinct but related question has also sharply split the courts: Does §301 preempt a plaintiff's claim where, as here, the employer injects CBA provisions into the case by way of defense? The cases fall into essentially three groups on this question, with two answering in the negative and one in the affirmative.

One line of cases, relying on *Caterpillar Inc. v. Williams* 482 U.S. 386 (1987), rejects the notion of "defensive preemption"

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[16] *See also* White, *supra*, at 413 (*Lingle* "was not resolved on the basis of the nature of the state law claim").

out of hand.[17] *Caterpillar* involved the issue of the limited jurisdiction of the federal courts in the removal context. The Court held that a defendant-employer sued in state court under state law could not create federal removal jurisdiction by raising CBA issues in its defense, observing that, in the removal context, the plaintiff is "the master of the claim." *Caterpillar*, 482 U.S. at 392. Absent "complete preemption" of the plaintiff's claim the federal district court in such a case lacks removal jurisdiction. *Id.* at 393.

To allow a plaintiff to control the choice of a state-court *forum*, however, is not to say he may unilaterally (by not mentioning the CBA provisions in his complaint) immunize his state-law claim from preemption under the test of *Lueck*. *See Hanks*, *note 17*, *supra*; White, *supra*, at 408-10. *Caterpillar* does not speak to the latter issue (so-called "ordinary preemption") and addresses defensive preemption strictly in the context of removal jurisdiction. Nonetheless, the interplay (if any) between *Caterpillar* and *Lueck*, and between "complete" and "ordinary" preemption, has been a source of much confusion and division in the lower courts. *See* White, *supra*, at 403-10 (and the authorities there cited and compiled). This case is an appropriate vehicle for the Court to resolve the conflict and to give guidance.

A second line of cases holds, as did the court below (A-4 to 5), that where the employer's "motivation" is a key element of the plaintiff's claim, that issue is always "purely factual" and, under the authority of *Lingle*, the claim is not preempted.[18] These cases

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[17] *See, e.g.*, *Nelson*, 878 F.2d at 202-203 ("the defendant may not destroy the state-law character of the plaintiff's suit merely by raising a legal defense"); *accord Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192, 197 n.8 (7th Cir. 1989); *contra Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) and other cases cited in note 22, *infra*.

[18] *See Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419 (10th Cir. 1993) (workers' compensation retaliation claim not preempted because only issue was "motive" of employer); *accord Marshall v. TRW, Inc.*, 900 F.2d

(Footnote 18 continued on next page)

so hold even where, as here, the employer contends that its reason and "motive" for terminating the employee was the employee's violation of specific provisions in the CBA (which the jury will need to interpret and apply, thereby triggering preemption). Some of these courts, like the one below, simply cite *Lingle* as authority and summarily reject such contentions by employers (even though, as noted in point B above, *Lingle* is fundamentally inapposite because the arbitrator's award foreclosed any such contention by Norge).

Other courts of this second school also rely on the language of *Lingle* but attempt to take the analysis a step farther. They say, drawing a very fine distinction, that the jury will need to decide only whether the employer's motive was truly to carry out its interpretation of its rights under the CBA (rather than some retaliatory motive), without further having to decide whether the employer's interpretation of the CBA is actually "*correct.*"[19]

(Footnote 18 continued)

1517 (10th Cir. 1990); *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990); *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473 (6th Cir. 1990); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989); *Bettis v. Oscar Mayer Foods Corp.*, 878 F.2d 192 (7th Cir. 1989); *Jones*, 931 F.2d at 1090 (workers' compensation retaliation claim not preempted because employer's CBA defenses merely go to the question of "credibility"); *cf. Sweeney v. Westvaco Co.*, 926 F.2d 29, 36 (1st Cir.) *cert. denied*, ___ U.S. ___, 112 S.Ct. 274 (1991) (but if "reasonableness" of employer's conduct is at issue rather than "motive," claim is preempted).

[19] *See Smolarek*, 879 F.2d at 1334 (only issue was whether employer "felt bound" by its interpretation of the CBA, not whether its "interpretation . . . is correct"); *Jarvis*, 985 F.2d at 1427 (employer's "contention that it was motivated by its understanding of the CBA is a factual matter for the jury" but the "correctness" of the employer's interpretation is not at issue, only whether it was held in "good faith" and "actually motivated" the employer); *Eldridge*, 920 F.2d at 1439 ("It is irrelevant whether the company's reliance on the labor agreement was reasonable or whether its interpretation of the agreement was correct"); *Bettis*, 878 F.2d at 197 (jury "must simply determine whether such a [non-retaliatory] motive exists — not whether . . . the CBA justifies such a motive").

Under this theory the jury will assess only the employer's subjective state of mind, without ever deciding whether the CBA actually conferred the rights the employer claimed to be exercising.

This distinction, not surprisingly, has been severely criticized. *See* White, *supra*, at 429-31; Marcus, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 221 (1989). How can the credibility of the employer's asserted "motive" to enforce and comply with specific provisions in a CBA be assessed without looking at those provisions to see what they say and what they appear to mean? It is unrealistic to presume that the jurors in such a case would be willing (or even able) to close their eyes to what the CBA provisions actually say and to reach no conclusions at all as to whether the employer's interpretations of the provisions and reliance thereon were reasonable or not.[20] The compelling federal labor law policy requiring uniformity of CBA interpretation — so that employers and unions can rest assured in the certainty that their bargained-for words and phrases will always be given their customary interpretation by *arbitrators* in accord with the *law of the shop* — is just as severely jeopardized in this case as it was in *Lueck*. The prospect that state-court jurors will be making their own determinations of Hussmann's rights under its bargained-for agreement with the Steelworkers is a matter of utmost concern to Hussmann and, we submit, to the federal interests embodied in §301.[21] This Court should grant review to scrutinize this widespread but highly suspect view of the lower courts.

[20] These realities of human nature will not change even if, as occurred in one case, the jurors are specifically instructed not to engage in interpretation of the labor agreement in assessing the employers asserted motive predicted thereon. *Marshall v. TRW, Inc.*, 900 F.2d 1517, 1524 (10th Cir. 1990).

[21] *See McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 538 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 912 (1992) ("[t]o exempt [plaintiff's] claims from preemption [where employer raises CBA defenses] would be to invite the courts of these states to give conflicting constructions to the single CBA in determining whether management conduct is wrongful"); White, *supra*, at 431; *see also* the cases cited in the next footnote.

The third line of cases, in direct conflict with the first two, holds that where, as here, the employer points to specific provisions in the CBA as its reasons for discharging the plaintiff, the state-law discharge claim is preempted.[22] In such a case, these courts hold, the fact finder will need to engage in interpretation and application of the CBA provisions in order to resolve the merits of the claim, thereby triggering preemption under §301.

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[22] *Nash*, note 15, *supra* (workers' compensation wrongful discharge claim preempted where employer's defense was that employee refused to comply with CBA provision requiring him to be examined by doctor selected by employer). All of the following cases likewise sustained preemption based on employer CBA defenses but involved claims other than for workers' compensation retaliatory discharge: *Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 524 & 530 (10th Cir. 1992) (plaintiff's claims "arose out of the manner in which [employer] conducted its investigation of suspected employee misconduct"; whether employer "wrongfully interrogated" plaintiff "will inevitably require analysis of what the CBA permitted"); *Johnson v. Anheuser Busch, Inc.* 876 F.2d 620, 624 (8th Cir. 1989) (whether alleged wrongful acts regarding discharge and "the investigation leading up to it" were "intentional" "would require us to decide whether [plaintiff's] discharge was warranted under the terms of the CBA"); *McCormick*, 934 F2d at 536 (claim preempted where employer's "authority" to act and the "rightness or wrongness" of its conduct is measured against CBA); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1018 & 1020 (10th Cir. 1990) (factfinder cannot determine wrongfulness of employer's conduct "without determining whether [it] was allowed under the [CBA]"; "Indeed, '[a]ctions that the [CBA] permits might be deemed reasonable in virtue of the fact that the CBA permits them'"); *Clark v. Newport News Shipbuilding and Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991) ("So long as the employer acted within his contractual rights, the claims cannot be evaluated without reference to the contract for a determination of whether the employer's actions were reasonable under the contract, taking into account the 'expectations of the parties' in light of the provisions of the agreement"); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 121 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989) (due to CBA defenses trial would "prominently feature the labor pact and its due construction"); *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400 (9th Cir.), *cert. denied*, 498 U.S. 835 (1990); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989); *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Newberry v. Pacific Racing Assoc.*, 854 F.2d 1142 (9th Cir. 1988).

In the case at bar, as plaintiff's own admissions confirm (*see* pp. 4 - 5, *supra*), the key issue in the trial of this case would be whether Hussmann acted properly in asking Cook questions about the apparently false statements in her employment application and in terminating her for refusing to answer. That issue, plainly, cannot be resolved without interpreting and applying the express[23] provisions in Hussmann's labor agreement which specifically address this situation and upon which Hussmann explicitly relied. *See* pp. 3 - 5, *supra*.

Under the cases of the third line, which conflict with the cases of the first two lines cited above, but which are in full accord with this Court's pronouncements in *Lingle* and *Lueck*, the court below should have found Cook's claims to be preempted by §301. This Court should grant review to settle the conflicts and to resolve these fundamental issues going to the very heart of the doctrine of §301 preemption.

Another question presented by this case — a question expressly reserved in *Lingle*, 486 U.S. at 409 n. 9 — is whether Cook's claim is barred by "waiver." Assuming *arguendo* Hussmann's "motive" could be assessed without interpreting the CBA and there is otherwise no preemption under the *Lueck/Lingle* contract-interpretation test, the further question then is whether Cook's state-law rights were nonetheless *waived* by the CBA entered into by the Steelworkers union on her behalf. The court below expressly held they were not (A-6).

As Cook's admissions make clear (pp. 4 - 5, *supra*), the key state-law right Cook claims Hussmann violated was her alleged right not to be asked questions about the injuries she denied having on her original employment application and her corresponding right to refuse to answer the questions. It is clear, however, that Hussmann had express and implied rights under

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[23] "Implied" rights and duties under the CBA might also need to be considered in resolving Cook's claim. *See Lueck*, 471 U.S. at 215.

the CBA to ask the questions and to discipline (including discharge) her for refusing to answer. *See* CBA provisions at pp. 3 - 5 , *supra*; *see also Laws*, 852 F.2d at 433-4 (CBA expressly and impliedly authorized employer to investigate suspected contract violation [re intoxication] and to discipline for insubordination employee who refused to be tested); *Clark v. Newport News Shipbuilding and Dry Dock Co.*, 937 F.2d 934, 937 (4th Cir. 1991) (employer may investigate and discharge for contract violations).

Cook's asserted state-law rights are thus diametrically opposed to Hussmann's rights under the CBA. This case squarely presents the question whether CBA provisions may "waive" and supersede rights existing under state law.[24] This is a fundamentally important question under the federal labor scheme,[25] as *Lingle*'s reservation of it confirms, and this case provides an appropriate vehicle to review it.

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[24] A further issue is whether the nonwaiver provision in the Missouri statute (*see* A-6) is itself preempted by federal labor law. *See Lingle*, 486 U.S. at 409 n. 9.

[25] The decision below also conflicts with the following cases on this issue: *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001 (9th Cir. 1987) ("union can waive the right of [an] employee to the protection of [state-law] tort"); *McCormick*, 934 F.2d at 537 ("If management . . . was entitled under the agreement to [act] in the manner it did, its actions *ipso facto* could not have been wrongful under state law"); *see also Medrano v. Excel Corp.*, 985 F.2d 230, 234 n. 3 (5th Cir. 1993) ("when a plaintiff asserts that acts unquestionably taken in accordance with the provisions of the CBA were nonetheless tortious, such claims will obviously require an interpretation of the CBA" and are therefore preempted); *but see Jarvis*, 985 F.2d at 1429 ("[t]he purpose of these actions [for retaliatory discharge] was to override the contractual rights of the employer").

CONCLUSION

Petitioner Hussmann Corporation respectfully submits that its Petition for a Writ of Certiorari to the Supreme Court of Missouri should be granted.

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 75142

ROSETTA COOK,
Appellant,

vs.

HUSSMANN CORPORATION,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

Honorable Robert W. Saitz, Judge

[Duplicate of filing on: April 20, 1993]

Section 287.780, RSMo 1986,[1] protects employees from retaliatory discharge or discrimination brought about by the employees' exercise of rights granted by the Workers' Compensation Act, Chapter 287, RSMo. We hold that neither federal nor Missouri law requires an employee to invoke or exhaust the grievance procedure in a collective bargaining agreement before filing suit under the statute. We accordingly reverse the summary judgment in favor of respondent, and remand.

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[1] The statute provides as follows:

> Discrimination because of exercising compensation rights prohibited — civil action for damages. — No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

I.

On review of a defendant's motion for summary judgment, this Court views the record in the light most favorable to the plaintiff, according to plaintiff all reasonable inferences that may be drawn from the evidence. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed in connection with the motion, demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Rule 74.04(c); Martin v. City of Washington,* __ S.W.2d __, __ (Mo. banc 1993).

The record below establishes that appellant Rosetta Cook was injured in the course of her employment with respondent Hussmann Corporation, a Missouri corporation, and that she filed a claim for workers' compensation against respondent and the second injury fund. The claim made reference to certain injuries sustained by appellant before she began working for respondent. Appellant asserts that respondent repeatedly tried to interrogate her concerning these injuries. On the advice of her attorney, appellant refused to answer respondent's questions unless she was allowed to have her attorney or a shop steward present in the room. Appellant alleges that she was suspended and then fired from her job because of this refusal.

Respondent filed a motion to dismiss or for summary judgment, supported by the affidavit of its general counsel and vice president. The affidavit asserts that appellant was covered by a collective bargaining agreement between respondent and the United Steelworkers of America. It states that appellant was terminated for insubordination and for failing to disclose pre-employment injuries and back problems in her employment application, in violation of plant rules and the labor agreement. Finally, it asserts that appellant never invoked the agreement's grievance procedure with respect to her discharge. Respondent

argues that, under federal law, appellant's failure to grieve her discharge precludes her from obtaining relief under *§ 287.780*.

Appellant and her attorney filed affidavits in opposition to respondent's motion, containing a detailed chronology of the events leading to the discharge. Appellant's affidavit adduces an admission by respondent that appellant would not have been questioned about her prior injuries if she had not filed her compensation claim.

The circuit court sustained respondent's motion for summary judgment, on the grounds that appellant did not file a grievance in accordance with her collective bargaining agreement. The Eastern District of the Court of Appeals reversed, holding that a civil action filed under *§ 287.780* is independent of the collective bargaining process and is not preempted by federal law. We granted transfer to resolve a conflict with earlier decisions that required exhaustion of the grievance mechanism prior to filing suit under the statute. *See Kramer v. McGlynn Bakeries, Inc.*, 738 S.W.2d 892 (Mo. App. 1987); *Barks v. Bi-State Development Agency*, 727 S.W.2d 464 (Mo. App. 1987); *Brock v. Stout Industries, Inc.*, 717 S.W.2d 278 (Mo. App. 1986); *McKiness v. Western Union Telegraph Co.*, 667 S.W.2d 738 (Mo. App. 1984).

II.

Appellant's first point asserts that her retaliatory discharge claim is not precluded by the collective bargaining agreement under either federal or Missouri law. Federal law controls the resolution of labor disputes when the parties have negotiated a collective bargaining agreement, through the Labor Relations Management Act, 29 U.S.C. *§ 185 et seq*. The United States Supreme Court has held that *§ 301* of the act preempts state law remedies that conflict with those provided by a labor contract. When the resolution of a state law claim is "substantially dependent" upon analysis of the terms of a labor contract, the

claim must be treated as a *§ 301* claim or dismissed as preempted by federal labor law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). The Eighth Circuit Court of Appeals interpreted *Lueck* to bar state statutory claims for retaliatory discharge when the parties are covered by a collective bargaining agreement. *Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986).

Our court of appeals was guided by these decisions when considering the impact of labor agreements on the right of action created by *§ 287.780*. In *McKiness*, the court ruled that whether an employee was discharged for exercising her workers' compensation rights is a dispute falling within the subject matter of a labor agreement. Thus, the court held that employees must exhaust the remedies provided in the agreement before seeking redress under *§ 287.780*. 667 S.W.2d at 741; *accord Kramer*, 738 S.W.2d at 894-5; *Barks*, 727 S.W.2d at 467. Further, the court gave preclusive effect to factual determinations reached through the collective bargaining grievance process when the agreement provides it is the exclusive remedy for disputes. *Brock*, 717 S.W.2d at 280; *accord Pratt v. Purcell Tire & Rubber Co.*, 846 S.W.2d 230, 233 (Mo. App. 1993).

Shortly after *Kramer*, *Barks* and *Brock* were decided, however, the United States Supreme Court recognized a limited exception to the reach of federal preemption in workers' compensation cases. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Supreme Court found that a state law remedy for retaliatory discharge is "independent" of a collective bargaining agreement, and thus not subject to preemption, if its resolution involves "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* at 407. This exception holds true even if the grievance mechanism and the state law remedy "would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself". *Id.* at 409-10.

"The analysis in *Lingle* applies with equal force to Missouri's workers' compensation statute." *Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988). Like the Illinois statute at issue in *Lingle*, *§ 287.780* created a judicially cognizable independent tort. *Hopkins v. Tip Top Plumbing & Heating Co.*, 805 S.W.2d 280, 286 (Mo. App. 1991); *Reed v. Sale Memorial Hospital & Clinic*, 698 S.W.2d 931, 940 (Mo. App. 1985). A claim brought under our statute presents factual questions that relate solely to the conduct and intent of the parties. *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984).

In short, appellant alleges that respondent fired her in retaliation for bringing a workers' compensation claim. If true, such acts violate *§ 287.780*, and that statute provides that a civil suit for damages may be brought. The rights and remedies provided by *§ 287.780* are independent of and in addition to any rights provided by the collective bargaining agreement. Although these same acts might have allowed appellant to proceed against respondent under the collective bargaining agreement for remedies provided therein, she did not do so, nor was she required to do so. Because appellant's *§ 287.780* claim is separate and independent of the collective bargaining agreement, it is not preempted by federal labor law. *Accord Wolfe*, 850 F.2d at 470.

III.

Missouri law also generally holds that when a collective bargaining agreement provides a grievance procedure for the settlement of disputes between the employer and the union or the employee, the party aggrieved must exhaust the remedies provided by the agreement before resorting to the courts for redress. *Williams v. St. Joe Minerals Corp.*, 639 S.W.2d 192, 195 (Mo. App. 1982); *Williams v. Clean Coverall Supply Co.*, 613 S.W.2d 659, 661 (Mo. App. 1980); *accord Grubb v. Leroy L. Wade & Son, Inc.*, 384 S.W.2d 528, 533 (Mo. 1964). This rule, however,

applies only to claims brought under the labor agreement and alleging a breach of its provisions. The exhaustion requirement does not extend to claims based exclusively on a violation of independent employee rights derived from a source other than the agreement, such as *§ 287.780*.

Moreover, the rights protected by *§ 287.780* cannot be bargained away. *See Haase v. New Hampshire Insurance Co.*, 795 S.W.2d 543, 544 (Mo. App. 1990). The Workers' Compensation Act provides that "no agreement by an employee or his dependents to waive his rights under this chapter shall be valid". *§ 287.390.1* RSMo Supp. 1992. The plain intent of this statute is, *inter alia*, to preserve the right of action granted by *§ 287.780*. Thus, under Missouri law, the inclusion of a grievance mechanism in a collective bargaining agreement cannot be deemed to be a waiver, either implicit or explicit, of the employees' statutory right to bring a civil action for retaliatory discharge or discrimination.[2] Accordingly, we hold that a *§ 287.780* suit may be brought without first invoking or exhausting the collective bargaining grievance process. The grant of summary judgment based on appellant's failure to grieve her discharge was in error.

Our disposition of this issue renders it unnecessary to consider appellant's remaining contentions. The summary judgment in favor of respondent is reversed, and the cause is remanded to the trial court for further proceedings.

WILLIAM RAY PRICE, JR., JUDGE

All concur.

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[2] The Supreme Court in *Lingle* left open the question of whether a union may waive its members' individual, nonpreempted state law rights. The Court noted that it would require "clear and unmistakable" evidence of waiver before deciding whether federal law preempts a state law bar (such as Missouri's *§ 287.780* to the waiver of these rights. 486 U.S. at 409 n. 9. The parties did not present such evidence of waiver in this case.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 60428

ROSETTA COOK,
Plaintiff-Appellant,

v.

HUSSMANN CORPORATION,
Defendant-Respondent.

Appeal from the Circuit Court of the County of St. Louis

Honorable Robert W. Saitz

OPINION FILED: June 30, 1992

Rosetta Cook (Plaintiff) instituted a discriminatory discharge action against Hussmann Corporation (Defendant) alleging that she was discharged because she filed a Workers' Compensation claim under § 287.780 RSMo 1986. The Circuit Court of St. Louis County entered summary judgment in favor of defendant and plaintiff appeals. We reverse and remand.

BACKGROUND

The pleadings, affidavits of both plaintiff and defendant and the exhibits reveal the following facts. Plaintiff, an employee of defendant, sustained injuries in the course and scope of her employment, and on August 9, 1990, filed a workers' compensation claim under § 287.780 RSMo 1986,[1] against defendant

[1] § 287.780 RSMo 1986 provides:

No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

All statutory references refer to RSMo 1986 unless otherwise cited.

and the second injury fund. A collective bargaining agreement was in force between defendant and Local 9014, United Steelworkers of America. Plaintiff was subject to its terms. Defendant received plaintiff's workers' compensation claim form, including the second injury fund claim, on August 16, 1990. In its answer to the claim for compensation, defendant admitted the accident.

Plaintiff's attorney informed her that it was unethical for any one employed by defendant and/or its insurance company to talk to her concerning her claim and that she should refuse to discuss her claim.

Plaintiff alleges that defendant discriminated against her in the following manner:

(a) In the morning of August 21, 1990, Eldon Williams, an employee of defendant's industrial relations department, called plaintiff to his office to discuss her claimed injuries. Plaintiff refused to divulge any information based upon her attorney's advice. In addition, plaintiff requested the presence of a shop steward, which was denied. Later in the afternoon, Ron Frank, superintendent of defendant's plant, escorted plaintiff to Mr. Williams' office. Plaintiff refused to answer any questions without the presence of a shop steward. Consequently, plaintiff was suspended.

(b) On August 27, 1990, defendant made repeated efforts to interrogate plaintiff concerning the details of her worker's compensation claim and the injuries claimed therein.

(c) On August 28, 1990, plaintiff met with Mr. Williams, another company official and a union representative. Plaintiff was questioned about her original employment application form and the injuries stated in her second injury claim fund. Once again plaintiff refused to give any information.

(d) On September 5, 1990, plaintiff received notice of her discharge from defendant's employ. Defendant's reasons for terminating plaintiff were violations of Plant Rule 1 (falsification of application or other company records), Plant Rule 20 (insubordination) and Article 9 § 4 paragraph I of the collective bargaining agreement (falsification or omission of relevant information on employment application).

Plaintiff did not grieve her discharge. Instead, she filed a petition alleging she was discriminatorily discharged for exercising her rights under the Missouri Workers' Compensation law. Plaintiff's petition incorporates the four elements required to state a cause of action for discriminatory discharge, namely: (1) plaintiff's status as an employee of defendant prior to the injury, (2) plaintiff's exercise of a right granted by Chapter 287, (3) employer's discharge of or discrimination against plaintiff, and (4) an exclusive causal connection between plaintiff's actions and defendant's actions. *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984); *Wiedower v. ACF Industries, Inc.*, 715 S.W.2d 303, 305 (Mo. App. 1986) appeal after remand 763 S.W.2d 333 (Mo. App. 1988); *Hopkins v. Tip Top Plumbing And Heating Co.*, 805 S.W.2d 280, 283 (Mo. App. 1991).

Defendant moved for summary judgment on three separate grounds, namely: (1) plaintiff failed to exhaust the grievance procedure under the governing collective bargaining agreement, (2) plaintiff's claim is preempted by § 301 of the federal Labor-Management Relations Act, 29 U.S.C. § 185(a), (3) the petition fails to state a claim upon which relief may be granted. Defendant attached the affidavit of its general counsel, Burton Halpern, which established that plaintiff was governed by the collective bargaining agreement and she neither grieved nor invoked the contractual grievance/arbitration procedure. Plaintiff and her attorney filed affidavits opposing summary judgment but did not dispute the two facts established by Mr. Halpern's affidavit. The

trial court granted defendant's motion for summary judgment on the ground that plaintiff failed to grieve her discharge.

ISSUES ON APPEAL

Plaintiff raises three issues on appeal. We limit our discussion to the first issue which is dispositive. The gist of plaintiff's first issue is that the statutory right for actual and punitive damages under § 287.780 exists independently of, and cannot be contracted away or provided for in the collective bargaining agreement. In addition, plaintiff asserts that the collective bargaining agreement does not provide for enforcement of the "public policy" right afforded by § 287.780.

STANDARD OF REVIEW

When reviewing a summary judgment motion, we glean through all the pleadings, depositions, answers to interrogatories and admissions on file, along with the affidavits to ascertain whether there is any material fact issue and whether the moving party is entitled to judgment as a matter of law. *Magee v. Blue Ridge Professional Building Co., Inc.*, 821 S.W.2d 839 (Mo. banc 1991). The party opposing summary judgment "may not rest upon mere allegations or denials in his pleadings but must, . . . by affidavits or otherwise, set forth specific facts showing a genuine issue for trial." *St. Charles County v. Dardenne Realty Co.*, 771 S.W.2d 828, 830 (Mo. banc 1989).

A summary judgment will be sustained on appeal if it is supportable on any theory, even though not the one adopted by the trial court. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 243 (Mo. banc 1984); *St. Louis Children's Hospital v. Commerce Bancshares, Inc.*, 799 S.W.2d 87, 90 (Mo. App. 1990). We review the record in the light most favorable to plaintiff. *Zafft*, 676 S.W.2d at 244.

DISCUSSION

Ab initio, we determine whether plaintiff's reliance on *Midgett v. Sackett-Chicago, Inc.*, 473 N.E.2d 1280 (Ill. 1984), 105 Ill. 2d 143, 85 Ill. Dec. 475 *cert. denied* 472 U.S. 1032, 105 S.Ct. 3513 and *cert. denied* 474 U.S. 909, 106 S.Ct. 278 is justified, and whether her cause of action for wrongful discharge stands, notwithstanding the fact that plaintiff failed to exhaust the grievance procedure mandated by the collective bargaining agreement. In *Midgett,* the Illinois Supreme Court held that union employees governed by a collective bargaining agreement could institute a tort action for retaliatory discharge "independent of any contract remedy the employee may have based on the collective-bargaining agreement."[2] 473 N.E.2d at 1283. In extending this independent tort action to union employees, the Illinois Supreme Court relied on the strong public policy of the State of Illinois in ensuring the protection of workers covered by the Workers' Compensation Act. *Id.* at 1284. Imposition of sanctions on violators of strong pubic policy and assessing punitive damages against employers who unjustly discharge employees was the main concern of the *Midgett* Court. *Id.*

Missouri Courts recognize that § 287.780 creates an "independent tort action for retaliatory discharge", and when the employer's actions warrant it, an award of punitive damages may lie. *Reed v. Sale Memorial Hosp. And Clinic,* 698 S.W.2d 931, 940 (Mo. App. 1985); *Wiedower,* 715 S.W.2d at 308; *Krasney v. Curators of University of Mo.*, 765 S.W.2d 646 (Mo. App. 1989) (". . . a violation of § 287.780 of the Workers'

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[2]Other jurisdictions recognizing that employees are not limited to contractual remedies are: "Puchert v. Agsalud (1984), Haw., 677 P.2d 449; Peabody Galion v. Dollar (10th Cir. 1981), 666 F.2d 1309; Carnation Co. v. Borner (Tex. 1980), 610 S.W.2d 450; Vaughn v. Pacific Northwest Bell Telephone Co. (1980), 289 Or. 73, 85-89, 611 P.2d 281, 287-90; Judson Steel Corp. v. Workers' Compensation Appeals Board (1978), 22 Cal.3d 658, 586 P.2d 564, 150 Cal. Rptr. 250." 473 N.E.2d at 1284-1285.

Compensation Law gives rise to a cause of action in damages for retaliatory discharge in favor of an employee . . . against the employer.") 765 S.W.2d at 651 n. 7 (citing *Hansome, supra,* and *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 149 (Mo. App. 1983).

The *Reed* Court states that § 287.780 declares "public policy" and should be construed in a manner whereby the remedy sought to be achieved by its enactment is promoted. 698 S.W.2d at 940. The "evil to be remedied" was the lack of an effective remedy for retaliatory discharge actions brought under Chapter 537. *Id.* In conclusion the *Reed* Court stated:

> One of the bases for recognition of a "common law" right to recovery was the inadequacy of the remedy afforded by criminal statutes which prohibited employers from interfering with their employees' exercise of their rights under the Workers' Compensation Law. *See Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, 359 (1979); *Lally v. Copygraphics,* 173 N.J. Super. 162, 413 A.2d 960, 969 (1980). *Id.*

In creating a "judicially cognizable tort" under § 287.780 Missouri courts have been motivated by a 'public policy' concern. In addition, our courts have drawn support from other jurisdictions in imposing punitive damages to quell unjustified employer action. *See Reed, supra* n. 2.

Here, the introductory clause of Article 7, in the Collective-Bargaining Agreement, reads as follows:

> "Section 1. The parties desire that complaints and grievances be settled *whenever possible* by the supervisor and the employee(s) in the department where the complaint originates.
>
> Grievances are defined as an alleged violation by the Company of a specific provision of this Agreement." (emphasis added).

Defendant argues that this language suggests a mandatory grievance procedure, which is expressly stated to be "final and binding." We read the language as permissive, not mandatory. *Cf. Barks v. Bi-State Development Agency*, 727 S.W.2d 464 (Mo. App. 1987);[3] *Brock v. Stout Industries, Inc.*, 717 S.W.2d 278 (Mo.App. 1986).[4] As a result, plaintiff can pursue an alternate route, particularly where, as here, plaintiff has satisfied the four elements necessary to bring an action for retaliatory discharge.

We are mindful of the teachings of *McKiness v. Western Union Telegraph Co.*, 667 S.W.2d 738, 741 (Mo. App. 1984), *Brock v. Stout Industries, Inc., supra* and *Barks v. Bi-State Development Agency, supra,* requiring exhaustion of the grievance procedure prior to resorting to the courts for redressal. However, in the above cited authorities, the court considered plaintiff's claim as though it were a breach of the collective-bargaining agreement, as opposed to a tort action. Accordingly, federal decisions mandating exhaustion of grievance procedures controlled. *See* Martucci & Eglinski, *Emerging Employment Litigation: Wrongful Discharge Update,* 45 J. of Mo. Bar 179, 184 (1989). *See also Johnson v. Hussmann Corp.*, 805 F.2d 795, 797 (8th Cir. 1986) (employee's state law tort claim for retaliatory discharge was pre-empted by federal labor law and stated a federal cause of action and was therefore properly removed to federal court.)

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[3] "Section 4 of the Collective Bargaining Contract provides in pertinent part that:

Any question relating to grievances or the interpretation of any provision of this Agreement arising between the Company and the Union or the employees which cannot be amicably adjusted by conferences, shall be submitted to arbitration as provided herein." *Barks*, 727 S.W.2d at 466.

[4] "All grievances shall be settled and determined exclusively by the Grievance Procedure . . . " *Brock*, 717 S.W.2d at 280.

We are guided by the United States Supreme Court decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) where the Supreme Court expressly addressed the issue: "whether an employee covered by a collective-bargaining agreement that provides her with a contractual remedy for discharge without just cause may enforce her state-law remedy for retaliatory discharge." 108 S.Ct. at 1879. In *Lingle*, the plaintiff filed suit in Illinois state court claiming she was discharged by her employer for exercising her rights under the Illinois Workers' Compensation Act. Illinois permits an employee, who is discharged for filing a workers' compensation claim, to sue for damages. The *Lingle* Court found that the elements necessary to bring a retaliatory discharge claim in Illinois did not require interpretation of any terms of the collective-bargaining agreement. *Id.* at 1882. The Supreme Court was aware that resolving a dispute according to a collective-bargaining agreement, on the one hand, and state law, on the other, would involve a similar factual inquiry. *Id.* at 1883. Therefore, the Supreme Court concluded that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes." *Id.*[5]

Defendant cites to *Kramer v. McGlynn Bakeries, Inc.*, 738 S.W.2d 892 (Mo. App. 1987) to advance the proposition that "the very allegation of discriminatory discharge in violation of § 287.780 is itself 'dependent upon terms of the collective-bargaining agreement for its proper resolution.' " 738 S.W.2d at 895. *Kramer* is distinguishable from the present case. The "acts of discrimination" complained of in *Kramer*, (for example,

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[5] In a different factual context, the court, in *Southwestern Bell Telephone Co. v. Buie*, 758 S.W.2d 157 (Mo. App. 1988), relying on *Lingle*, held that state law applied where the collective-bargaining agreement had not been interpreted by the trial court. *Id.* at 161. *Buie* was not a retaliatory discharge case. Buie grieved his suspension and chargeback of commissions which was upheld by the arbitrator.

reduction in working hours after plaintiff filed her Workers' Compensation claim, defendant's refusal to pay disability benefits or reimburse her medical expenses, "to retain the same days off that she had previously had.") warranted construction and interpretation of the collective-bargaining agreement. *Id.* Accordingly, the *Kramer* Court held that plaintiff's claim was preempted by federal law. Here, the "acts of discrimination" are independent of the collective-bargaining agreement.

We believe *Lingle* controls the present case. The "acts of discrimination" complained of do not compel construction or interpretation of the collective-bargaining agreement. Missouri permits an employee who is discharged for filing a workers' compensation claim to sue for damages. Plaintiff has stated a cause of action for discriminatory discharge under § 287.780. Defendant's motion for summary judgment cannot be sustained on any theory. *Zafft v. Eli Lily Co., supra.*

Judgment reversed and cause remanded for further proceedings.

/s/ James A. Pudlowski
JAMES A. PUDLOWSKI,
PRESIDING JUDGE

JUDGE ALBERT J. STEPHAN JR.,
and
JUDGE ROBERT E. CRIST, CONCUR.

APPENDIX C

IN THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

DIVISION 6

No. 616212

Team B

ROSETTA COOK,
Plaintiff,

v.

HUSSMANN CORPORATION,
Defendant.

JUDGMENT

[Filed: June 18, 1991]

On December 26, 1990 defendant Hussmann Corporation filed its Motion for Summary Judgment and to Dismiss. On June 18, 1991, the matter came up for hearing, the parties appearing by counsel.

After considering the arguments of counsel, the parties' briefs, all exhibits, affidavits, and other matters of record, the Court finds it to be undisputed that plaintiff did not file a grievance in accordance with the collective bargaining agreement in existence at the time of the occurrence mentioned in the petition and the Court therefore concludes that defendant is entitled to judgment in its favor as a matter of law.

Accordingly, on this 18th day of June, 1991 it is hereby ORDERED, ADJUDGED AND DECREED that defendant's motion be and the same is hereby sustained and that plaintiff's

cause of action be and the same is hereby dismissed with prejudice, at plaintiff's costs.

SO ORDERED:

/s/ Robert W. Saitz
Judge

Dated: June 18, 1991